

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6190-6195

ORIGINAL

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

IN THE MATTER

of

The Complaint of TUG OCEAN PRINCE, INC. and RED STAR TOWING
& TRANSPORTATION Co., as Owner and Charterer of the Tug
"Ocean Prince", for Exoneration from or Limitation of Liability,
*Plaintiffs and Third Party Plaintiffs-
Appellees and Cross-Appellants,*

v.

UNITED STATES OF AMERICA,
Third Party Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

against

PITTSTON MARINE TRANSPORT CORP.,
Defendant-Appellee,

TUG OCEAN PRINCE, INC. and RED STAR TOWING &
TRANSPORTATION Co.,
Defendants-Appellees.

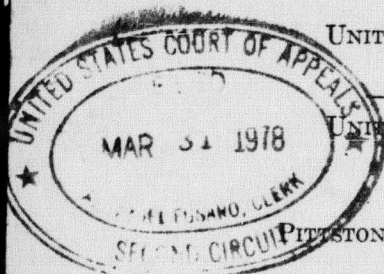
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF APPELLEES TUG OCEAN PRINCE INC. AND
RED STAR TOWING & TRANSPORTATION COMPANY
IN ANSWER TO THE BRIEFS OF APPELLANTS
PITTSTON MARINE TRANSPORT CORP. AND
UNITED STATES OF AMERICA**

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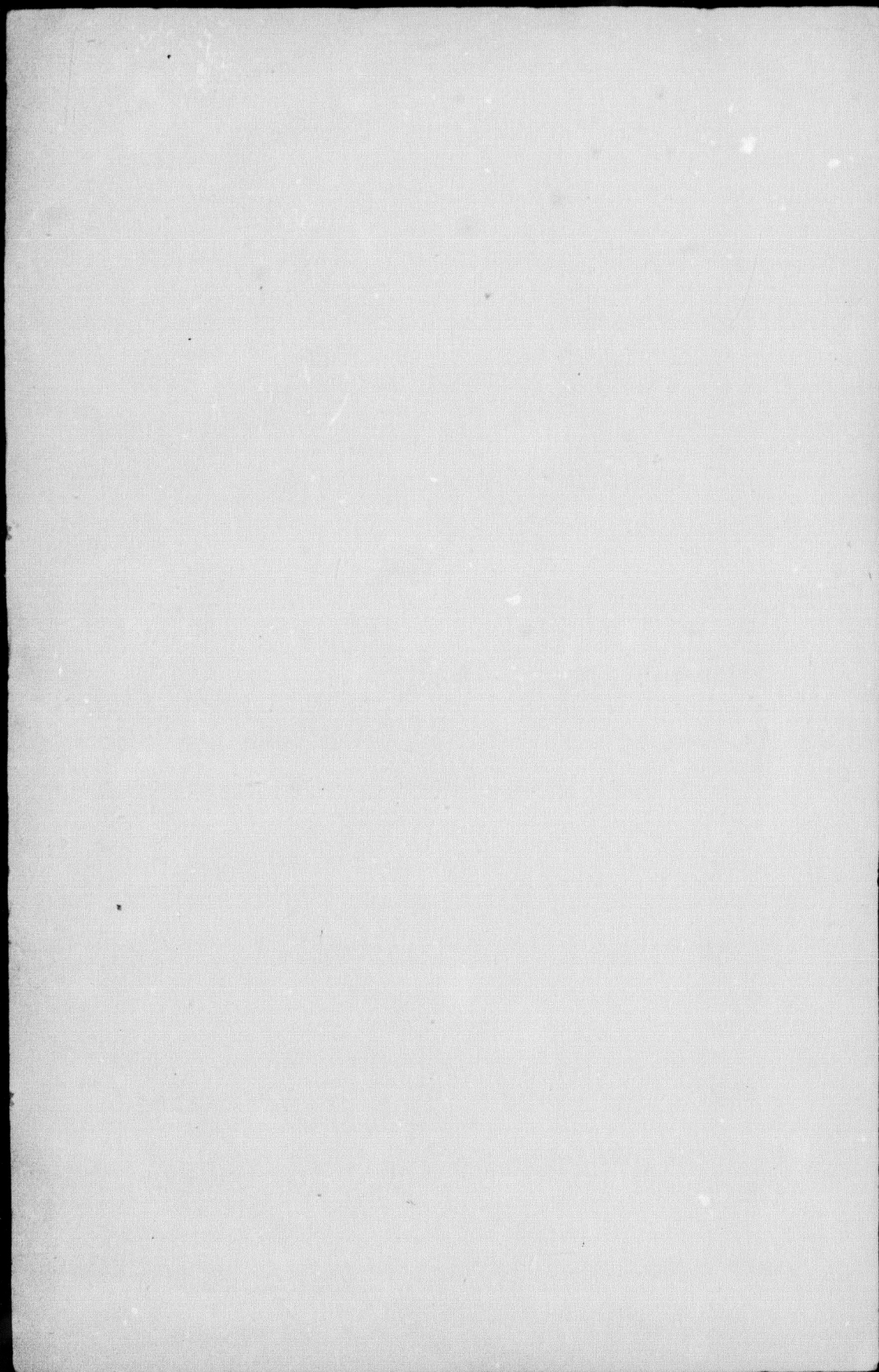


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**BRIEF OF APPELLEES TUG OCEAN PRINCE INC. AND
RED STAR TOWING & TRANSPORTATION COMPANY
IN ANSWER TO THE BRIEFS OF APPELLANTS
PITTSTON MARINE TRANSPORT CORP. AND
UNITED STATES OF AMERICA**

Preliminary Statement

On this appeal, Tug Ocean Prince, Inc. and Red Star Towing and Transportation Company, the owner and charterer, respectively, of the Tug OCEAN PRINCE, hereinafter referred to collectively as "Red Star", seek affirmation of the Order and Opinion of the United States District Court for the Southern District of New York (Honorable Gerard L. Goetell, D.J.) in the above actions consolidated for trial (1) holding that Red Star is entitled to limit its liability to claimant, appellant Pittston Marine Transport Corporation (hereinafter "Pittston") to the value of the TUG OCEAN PRINCE and the amount of her pending freight immediately after the casualty, which is the subject of Pittston's appeal in the Limitation of Liability Proceeding (77-6190), and (2) holding that Red Star is entitled to limit its liability to plaintiff-appellant United States of America (hereinafter "Government") for pollution clean-up expenses to \$19,800 (\$100 per ton of the Tug's gross tonnage), which is the subject of the Government's appeal in its suit (77-6195).

This Brief is addressed both to the issues raised by Pittston in its appeal and to the issues raised by the Government in its appeal.

Red Star seeks a reversal of that part of the Opinion and Order below which dismissed Red Star's claim in the Limitation Proceeding against the Government for contribution with respect to Pittston's damages. Red Star, as cross-appellant in the Limitation Proceeding, has filed a separate Brief on the issue of the Government's contributing fault.

Statement of Issues Presented for Review

The District Court found that the Tug OCEAN PRINCE carried a full crew including two United States Coast Guard licensed navigators who were experienced tug pilot-house men, one of whom had over thirty years experience navigating the Hudson River, which manning was in accordance with industry standards and otherwise did not amount to an unseaworthy condition within Red Star's privity and knowledge, and that the Tug was otherwise equipped with charts, radar, compasses and other navigational aids which were in good working order at the time of the casualty. It also found that the grounding was caused by an error in navigation on the part of the Mate of the Tug in misjudging the Vessels' position in the river, and by an error in management on the Mate's part in not seeking the assistance of the Tug's Captain under the circumstances then existing, which faults were not within the privity and knowledge of Red Star's management. The Court therefore declined to exonerate Red Star but granted limitation of liability in accordance with 46 U.S.C. § 183 et seq. in respect of Pittston's claim in the Limitation Proceeding, and in the Government's suit for pollution removal expenses limited the Government's recovery against Red Star to \$19,800 in accordance with 33 U.S.C. § 1321(g).

The issues to be decided on this appeal are (1) whether or not the District Court properly held that Red Star is entitled to limit its liability to Pittston to the value of the Tug OCEAN PRINCE and her pending freight immediately after the casualty, (2) whether or not the District Court properly held that the Government's claim against Red Star for pollution removal expenses under 33 U.S.C. § 1321(g) is subject to a limitation of \$19,800, and (3) whether or not the District Court erred in holding that the Government is not contributorily at fault for the casualty and therefore not liable to Red Star for contribution in respect of Pittston's damages.

As noted, this Brief is addressed to issues (1) and (2) above.

Statement of the Case

Red Star respectfully refers this Court to the Statement of the Case set forth in the Brief it has submitted as cross-appellant in 77-6190, in which it seeks reversal of that part of the District Court's decision which dismissed Red Star's claim against the Government for contribution in respect of Pittston's damages.

Statement of Facts

Pittston's and the Government's so-called "Statement of Facts" should more appropriately be labelled "Argument". They seriously distort the evidence presented in the District Court which formed the basis for the Court's decision.

The Tug OCEAN PRINCE is an 1800 horsepower, steel tug-boat documented under the laws of the United States, having an overall length of 94.7 feet and a gross tonnage of 198 tons (11a).¹ At the time of the casualty, she was operated by Red Star for general coastal and harbor towing in, among other places, New York Harbor including the Hudson River. The Tug was equipped with, among other things, radar, a gyro-compass, a magnetic compass, direct pilothouse engine controls and a spotlight mounted on the roof of the pilothouse and operated from inside, and she had on board current editions of the Light List and Coast Pilot (11a-12a). Her chart for the area in question was a 1969 edition. While a subsequent edition was available, there were no material differences in the locations and characteristics of the relevant aids to navigation. Buoy "21" was renumbered to Buoy "25" (11a-12a).

¹ All references are to pages of the Joint Appendix unless otherwise indicated.

On February 2 and 3, 1974, the OCEAN PRINCE carried a full crew of six men, including two United States Coast Guard licensed navigators, Captain John Kiernan and Mate Walter E. Reimer, who stood the usual alternating six-hour watches (14a). At the time of the casualty Reimer was on watch and in charge of the Tug's navigation. While Red Star had intended him to be Mate for this voyage, he had a Captain's rating and was employed by Red Star in the capacity of Captain, Relief Captain and Mate, principally on board the OCEAN PRINCE, for a period of one and one-half (1½) years before the voyage in question. Overall he served in the capacity of navigator on tugs for five years with various companies, and prior to that worked as a deckhand and seaman on vessels, including vessels employed in the Hudson River (Finding 16; 15a; 17a).

Captain Kiernan was employed by an associated company, Spentonbush Transportation Co., Inc., as Tug Captain but was temporarily assigned to the OCEAN PRINCE to fill a vacancy, not an uncommon practice between Red Star and Spentonbush, of which Kiernan was aware although he himself had not done it before. Kiernan had extensive experience on the Hudson River which spanned over a period of more than 30 years (17a).

On February 2, 1974, prior to the voyage in question, the OCEAN PRINCE was at the Bushey Shipyard in Gowanus Bay waiting for orders. Kiernan was on board from the prior day. Reimer returned from an extended vacation and re-joined the Tug at the shipyard (16a).

Red Star intended Kiernan to be Captain and Reimer to be Mate, and Red Star's day dispatcher so informed the night dispatcher, Philip Keenan, who eventually assigned the OCEAN PRINCE to the voyage in question. At trial, Kiernan indicated doubt in his own mind that he was Captain since Reimer was regularly assigned to the OCEAN PRINCE, but Kiernan's actions on board the Tug on February 2nd and 3rd showed that he knew he was there as

senior man (17a). Kiernan performed the Captain's duties and exercised the Captain's prerogatives while he was aboard the Vessel. He stood the traditional Captain's Watch (1800-2400 hours), and occupied the Captain's quarters directly behind the pilot house. According to the testimony, the difference between the Mate's and Captain's quarters is "dramatic" and delineates the line of authority in the eyes of the men on board (742a).

In addition, Kiernan performed the paperwork duties of the Captain including preparation of the Tug's Daily Reports (Exh. G) which he signed as Captain, and the Tug's Payroll for the voyage (Exh. 41) in which he listed himself as "Captain" and Reimer as "Alternate Captain".

On February 2, 1974, the OCEAN PRINCE was dispatched to the Exxon Terminal at Bayonne, New Jersey to tow Pittston's barge, the NEW LONDON, to Kingston, New York. Captain Kiernan, who stood the 1800-2400 hours watch, was on watch. The Tug "made-up" to the Barge in the Barge's pushing well located at the stern, and the Vessels were underway at 1915 hours. Mate Reimer assisted the Tug's deckhands in making-up the tow, and then went below when the voyage commenced. Kiernan had the conn during the first leg of the voyage (18a).

At about 2330 hours, Reimer came to the pilothouse to relieve Kiernan of the watch one-half hour early. The Vessels were in Haverstraw Bay at the time. Both men talked for about 15 minutes, and then Kiernan retired to the Captain's quarters directly behind the pilothouse. The Tug, with Reimer now in charge, continued the trip north-bound past Peekskill and through Bear Mountain Bridge. Reimer did not request Kiernan to stand the watch with him, although Kiernan would have if asked, which is customary practice on tugboats if the watchstander believes it would be helpful, irrespective of whether he was Captain or Mate (19a).

The trip was uneventful up to this point, the Tow was handling well, and the Tug and her navigation equipment were working properly. At all relevant times, the tide was ebbing, there was drift ice in the river with heavier accumulations along the shorelines and visibility was two miles with snow flurries. The Tug was making good a speed of about 6 knots (the Vessels were proceeding against the current). The Tug's radar was operating and in use. A navigation chart for the area was open and was also in use. Reimer was able to see both shorelines and over the full length of the Barge and a safe distance ahead. He was using his radar from time to time to confirm his visual sightings and to locate aids to navigation and other points of reference ahead (19a-20a).

About one and three quarter (1¾) miles north of Bear Mountain Bridge lies a large submerged rock formation on the west side of the channel, which is clearly indicated on the navigation chart and marked, in winter months, by the unlighted black can buoy "25".² The apex of the rock formation is seven feet below the surface of the water at low tide. Reimer knew of the existence of the unlighted black can buoy and the rock obstruction it marked, and he began looking for it as he approached Mystery Point, both visually using the Tug's powerful spotlight to illuminate the area ahead and on radar (20a-21a).

When he was unable to locate the buoy, Reimer became concerned since he knew it marked a dangerous rock obstruction. He therefore reduced engine speed to "half, maybe less" and continued searching for the buoy both visually with the use of the spotlight and on radar. Shortly afterwards, the Barge struck the rock on the Barge's port bow, which resulted in an escape of oil from the damaged cargo tanks (21a-22a).

² The buoy was formerly known as the "21" buoy. It was re-numbered by the Coast Guard without change in its location or characteristics.

The buoy did not come into view prior to the casualty. It was eventually seen by Reimer after the casualty, laying over under ice near the Vessels' wake. The Vessels apparently cleared the ice which accumulated over the buoy obscuring it from view after passing over it (22a).

Prior to the casualty, Reimer was travelling what he believed to be the center line of the channel determined by observations of the shoreline, but he strayed from safe water due to ice accumulations along the shorelines including north of Mystery Point on the easterly shore which distorted the image of the shoreline both to the eye and on radar (22a).

Argument

Red Star contended in the District Court that the casualty did not result from any negligence on the part of those in charge of the navigation of the Tug, or unseaworthiness of the Tug, but rather was caused solely by negligence on the part of the Government in that it continued to employ what it knew was an inadequate aid to navigation at the site of the casualty, which was the proximate cause of the casualty. Alternatively, Red Star contended, and the District Court held, that if it was liable, the liability resulted from errors of navigation and management on board the Tug not within Red Star's privity and knowledge. Therefore its liability to Pittston is limited to the value of the Tug OCEAN PRINCE and her pending freight immediately after the casualty in accordance with the Limitation of Liability Act, 46 U.S.C. § 183, and its liability to the Government was subject to the tonnage limitation contained in 33 U.S.C. § 1321(g).

As noted, the issue of the Government's liability is treated in Red Star's Brief submitted as cross-appellant in 77-6190.

Red Star does not dispute on this appeal the question of exoneration. However, even if the grounding was the result of errors in navigation and management of the Tug on the part of Mate Reimer, those errors were not within Red Star's privity and knowledge, and therefore Red Star is entitled to limitation of liability in respect of Pittston's claim in accordance with 46 U.S.C. § 183.

The Government's claim under the Federal Water Pollution Control Act (hereinafter the "Pollution Statute"), 33 U.S.C. § 1251 et seq., while also requiring privity and knowledge on the part of Red Star before the Government would be entitled to a recovery in excess of the statutory limitation, is different from Pittston's claim in the Limitation Proceeding in two respects. First, willful negligence or willful misconduct within Red Star's privity and knowledge, not merely ordinary negligence, must be shown, and second, the Government carries the burden of proof on that issue. 33 U.S.C. § 1321(g).

The District Court never reached the willful negligence or misconduct questions since it found that errors of navigation and management on the part of Mate Reimer caused the casualty, which were not contributed to by unseaworthiness of the Tug or fault within Red Star's privity and knowledge, and it therefore granted limitation in respect of both claims (as to Pittston, in accordance with the Limitation of Liability Act, and as to the Government, in accordance with the tonnage limitation contained in the Pollution Statute).

The points of argument raised by Pittston and the Government on this appeal were the subject of extensive evidence, at trial, on the basis of which the District Court properly concluded that the OCEAN PRINCE was in all respects fit and properly manned by competent personnel, and they are entirely issues of fact which do not become issues of law simply by characterizing them as such.

POINT I

The casualty resulted from a cause outside Red Star's privity and knowledge, and it is entitled to limitation of liability.

If the grounding was the result of fault attributable to Red Star, it was the result of an error in navigation outside its privity and knowledge, and pursuant to the Limitation of Liability Act, 46 U.S.C. § 183 et seq., it is entitled to limit its liability to Pittston to the value of the Tug immediately after the grounding. See *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104, 121, 20 L. Ed. 585, 591 (1872) (a shipowner is entitled to limit his liability to the value of the ship after the loss has taken place). The evidence showed, and the District Court found, that the negligence was on the part of Mate Reimer, who simply misjudged his position in the river and who should have stopped when he realized he was not certain of the Tug's position.

The evidence also showed that the grounding was not caused by any fault within the privity and knowledge of Red Star. The management and navigation of the Tug was under the sole control of Mate Reimer at the time of the casualty, and any errors on his part cannot be found to have been within Red Star's privity and knowledge. See, e.g., *Petition of Tracy*, 194 F.2d 362, 363 (2d Cir. 1952); *The George W. Pratt*, 76 F.2d 902, 904 (2d Cir. 1935); *Petition of United States*, 69 F. Supp. 538, 543 (S.D.N.Y., 1947); *Jacobus Grawwiller Co., Inc. v. Reichert*, 136 F.2d 904 (2d Cir. 1943); *The Soerstad*, 257 F. 130, 131 (S.D.N.Y., 1919); *The George W. Fields*, 237 F. 403, 404 (S.D.N.Y. 1915).

Where, as in this case, the parties claiming the right of limitation of liability are corporations, "the privity or knowledge must be that of the managing officers of the corporation." *Craig v. Continental Ins. Co.*, 141 U.S. 638

(1891). Any negligence on the part of Mate Reimer, therefore, was clearly not within the privity and knowledge of Red Star. See, e.g., *The African Neptune*, 530 F. 2d 7 (5th Cir. 1976). As stated in 3 *Benedict on Admiralty* § 42, 5-17 (1975):

"The men who actually go to sea in the ships, and the shore staff who are of less than managerial rank, are persons whose knowledge or privity does not affect a corporate shipowner. * * * The navigation of the vessel is under the absolute control of her master * * * and no case has been found where a shipowner, individual or corporate, has been denied limitation because of a liability arising out of an error of management or of navigation on a voyage committed by an employee whom the owner was warranted in believing to be competent with knowledge of his duties."

A. The OCEAN PRINCE was manned in accordance with U.S. Coast Guard requirements, with competent navigators having extensive experience on tugboats

Pittston's and the Government's contentions regarding the manning of the OCEAN PRINCE fall into three categories which can be summarized as follows: (1) that Mate Reimer was an incompetent navigator; (2) that confusion expressed at trial as to which of the two pilothouse men was senior man was an unseaworthy condition within Red Star's privity and knowledge; and (3) that employing a crew for a voyage through waters on which one of the two pilothouse men had not navigated before constitutes, per se, unseaworthiness.

The allegation of incompetence was never supported by any evidence whatsoever in the District Court. Reimer held a valid license issued by the United States Coast Guard (Exh. 1) which gave him authority to serve as operator of uninspected towing vessels upon the inland waters of the United States, including the Hudson River.

At the time of the casualty, he had been employed as a mariner for eight years, of which the last five were spent as Captain, Relief Captain and Mate on board tug boats. When he was employed by Red Star approximately one and one-half years prior to the casualty, his background and prior employment were checked, and he performed ably and demonstrated himself as a good boatman for Red Star (Finding 16; 15a). Red Star was therefore fully justified in considering him a competent navigator for the voyage in question through well charted waters. See, e.g., *The George W. Pratt*, 76 F.2d 902 (2nd Cir., 1935). Although he may have erred in his judgment as to the Tug's position at the time of the casualty, the grounding was in no way the result of incompetence on his part. As the Court stated in *South Carolina Highway Dep't v. Jacksonville Shipyards, Inc.*, 1976 A.M.C. 456, 457 (S.D., Ga., 1976):

"One navigational error does not make an incompetent mariner."

It should be noted that the can buoy "25" marks a dangerous rock obstruction in the Hudson River, which has been the bane of many mariners before and after Reimer, the history of which was unknown to the maritime community, with the exception of the U.S. Coast Guard which itself lost at least two vessels there.

Pittston and the Government also argue that Red Star failed to designate a Captain for the voyage, and that therefore the OCEAN PRINCE was unseaworthy. While there was testimony by Kiernan at trial that he understood he was going aboard the OCEAN PRINCE as Mate, the evidence supported the contrary conclusion that he was in fact designated Captain for the voyage and that he understood he was senior man.

The District Court, after hearing a number of industry witnesses, appreciated that quite unlike ocean going ves-

sels, one of the few distinguishing features between a Captain and a Mate on tugboats is responsibility for certain administrative chores. The District Court therefore did not reach the question whether Red Star in fact designated Kiernan Captain for the voyage as the evidence indicates despite Kiernan's testimony to the contrary, since it was unnecessary to do so in resolving the issues presented by the case. Clearly, however, the District Court had grave reservations concerning Kiernan's testimony in this regard. In Finding 21 (17a), the Court stated:

"Red Star's Personnel Department was responsible for designating the Captain of the Vessel. Red Star intended Kiernan would be Captain. Kiernan indicated doubt in his own mind that he was Captain, but he took certain steps which were appropriately done by the Captain. * * *."

Kiernan was first assigned to the OCEAN PRINCE while the Captain on the prior tour, Cromer, was still aboard. On February 2nd, while the Tug was at the Bushey Shipyard, Cromer left the Tug and Reimer joined. From that time on, Kiernan knew he was senior man. He performed the Captain's duties and exercised the Captain's prerogatives while he was aboard the Vessel. He stood the traditional Captain's watch from 1800-2400 hours, and occupied the Captain's quarters directly behind the pilot house. While these may seem small details, as Philip Keenan, Red Star's night dispatcher, testified, the difference between the Mate's and Captain's quarters on the OCEAN PRINCE is "dramatic" and delineates the line of authority in the eyes of the men on board.

Kiernan also testified that he performed the paperwork duties of the Captain, including preparation of the Tug's Daily Reports which he signed as Captain (Exh. G). Kiernan stated he signed the report "because nobody was taking care of the paper work", which was not to be unex-

pected since Reimer understood that Kiernan was in command.

Finally, Kiernan prepared the Daily Payroll (Exh. 41) for the voyage, in which he listed himself as "Captain" and Reimer as "Alternate Captain". As Mr. Walter Kristiansen, Red Star's Vice President of Operations, testified, there is a well understood difference between these two positions, and Kiernan's listing of himself as "Captain" shows that he understood at the time in question he was the senior man on the Vessel (.36a).

Philip Keenan also testified Kiernan was designated Captain for the voyage, and was told that by Robert Fitch, the day dispatcher Keenan relieved.

Kiernan's testimony, therefore, that "he was going on board as Mate" is contrary to all the evidence and not credible.

Finally, Pittston and the Government argue in respect of the manning of the Tug that the dispatching of the OCEAN PRINCE to an area one of the two pilothouse men had not navigated before created an unseaworthy condition within Red Star's privity and knowledge. The Government's argument (unsupported by relevant authority) continues that lack of experience on a particular waterway renders a navigator unqualified. The law is settled, however, that *a ship is not unseaworthy* because her navigator, though otherwise experienced and competent, has no prior knowledge of local conditions. The question was settled in *The Temple Bar*, 137 F.2d 293, 297 (4th Cir. 1943), where the court stated as follows with respect to the decision in *The Lady Pike*, 88 U.S. (21 Wall.) 1, 22 L. Ed. 499 (1874):

"[T]he decision cannot be accepted as authority for the broad proposition that it is negligent to put a master in charge of a ship, whatever the voyage, unless he is familiar with all the local conditions he may be expected to encounter."

"If, as in the case at bar, a master, qualified in other respects, is placed in command, and if he is supplied with charts and publications sufficient to enable a competent man safely to navigate the ship, it is not necessary that he should have prior knowledge of local conditions; and lack of it will not cause the ship to be unseaworthy."

As noted, Red Star placed aboard the OCEAN PRINCE for the voyage in question, two navigators experienced³ and tested in inland and coastal waters, whose Coast Guard issued licenses qualified both to navigate the Hudson River.

The evidence presented at trial was that Red Star's requirements before assigning one of its tugs to a particular voyage was that one of the two pilothouse men have extensive experience in the waterway to be traversed. Philip Keenan, Red Star's dispatcher who assigned the OCEAN PRINCE to tow the NEW LONDON to Kingston, New York, was aware of the make-up of the crew of the OCEAN PRINCE, and knew of Reimer's lack of experience on the Hudson River. He also knew, however, that Kiernan was aboard, and that Kiernan had extensive experience as tug navigator on the Hudson River. He decided, therefore, that the OCEAN PRINCE would be suitable for the voyage and that Kiernan would be able to assist Reimer if necessary (Finding 23; 17a-18a).

Regardless of who is designated Captain or Mate, it is the practice in the tugboat industry—and it was the practice of Kiernan—that when one of the navigators is familiar with the area to which the tug has been dispatched, and the other is not, the former will assist the other if

³ Both Pittston and the Government repeatedly employ the word "inexperienced" in their Briefs when referring to Mate Reimer. It bears emphasis that while Reimer had not navigated the Hudson River before, he was nonetheless an experienced boatman, as the District Court found.

needed. Kiernan's testimony on his practice in this common situation was as follows:

"Q. Captain, have you been to areas with a mate or captain to which one of you had not been before?

A. Yes, sir, many times.

* * *

"The Court: What, if anything, is the standard practice in the tugboat trade when one of two steerers is familiar with the waters and the other is not.

The Witness: Well, sir, if they asked advice or ask you to sit up with them I'd be glad to sit up with them. * * *

Q. Captain, did Mate Reimer ask you to sit up with him for any part of his watch?

A. No, sir.

Q. Had he done so, he done so, would you have stayed up?

* * *

A. Yes, sir.

Q. If he asked you for advice, would you have given it to him?

A. Yes.

Q. Would it have made any difference to you whether you were designated the captain or designated the mate on that boat?

A. No, none." (432a-435a)

Moreover, as Pittston's expert, Mr. Stillwaggon, stated, it is not only the recognized duty of the men on board to talk with one another about their familiarity with the area they are working in, it is inconceivable that two experienced navigators would not have discussed the voyage they were undertaking (653a). Although Reimer and Kiernan both had only vague memories about their discussions with one another during the voyage in question, Kiernan recalled that he was with Reimer in the pilothouse for about 15-20

minutes before Reimer relieved him of his watch at 2400 hours on February 2nd, and that he "told him a couple of bad spots he might have to look out for." While Kiernan stated that he himself did not consider the rocks marked by buoy 25 to be a bad spot in the river, in response to the Court's question as to what points he did mention to Reimer, he stated "probably buoy 21⁴ was one."

Thus, Kiernan did not have to be specifically advised that he should give Reimer advice and assistance. Kiernan's testimony was that it made no difference whether, as the man familiar with the area, he was designated Captain or Mate; in either case, as the experienced man, it was his practice to offer advice and assistance whenever necessary. Moreover, his testimony was that he had done this for the voyage in question, and that he had probably given Reimer specific advice about the area of the grounding.

There can be no question, therefore, that with Kiernan on board, the Tug was in all respects seaworthy for the voyage. If there was a failure on the part of Kiernan or Reimer to consult with the other about the voyage ahead, this was not a fault for which Red Star is responsible. By putting an experienced man with extensive knowledge of local conditions on the Hudson River on board, Red Star fully performed its duty to take steps to insure that the OCEAN PRINCE was fit for the voyage. As Keenan, the dispatcher, testified, Kiernan wasn't just there; he was put on board for the specific purpose of insuring that a man familiar with the Hudson River would be in the pilothouse whenever necessary.

Thus, the District Court found that "the dispatcher's decision to assign the OCEAN PRINCE to the NEW LONDON job was in accordance with accepted practice in the tugboat industry of dispatching a tug to an area one of the naviga-

⁴ The reference was intended as the rock now marked by buoy "25".

tors had not navigated before as long as the other navigator on board has experience in the area" (Finding 23; 18a). It is an understatement, indeed, to say, as did Pittston in its Brief, that Red Star merely assumed the pilothouse men would confer between themselves; it is inconceivable that they would not or did not.

The difficulty on the voyage arose after the OCEAN PRINCE and her tow passed Bear Mountain Bridge. Ice accumulated along the shorelines ahead, and the "25" can buoy which marked the rock formation, unknown to Reimer at the time, was dragged under the ice and was not visible. Reimer knew of the rock formation, he knew of its location on the chart, and he knew it was marked by the black can buoy. He perceived his Vessels might be in danger long before he reached the location of the rocks, and he reacted by reducing engine speed and by intensifying his search for the buoy. He used his radar and spotlight, but he did not call Kiernan who was located only a few feet away in the Captain's quarters directly behind the pilothouse; and if he was in error for not doing so, the error was his alone because Red Star put Kiernan aboard for just such a contingency, that is, to assist Reimer if Reimer believed he need assistance under the circumstances then existing, not to stand Reimer's watches with him as Pittston and the Government repeatedly urge because Reimer was an experienced and capable navigator as the District Court found, but to be available to Reimer if Reimer needed him. If, as the District Court concluded, Reimer committed an error in not stopping his Vessel, which he easily could have done, and summoning Kiernan, the error was one of management on his part.

An error in management on board the Tug is not a fault which may be imputed to the vessel owner or operator to deny him the right of limitation of liability. See, e.g. *South Carolina Hwy. Dep't v. Jacksonville Shipyards*, 1976 A.M.C. 456, 468 (S.D. Ga. 1975), where the Court held that

"when a tow is entrusted to the management of a competent master and mate, it is not negligence for the owner to fail to instruct them as to the vagaries of currents along the course of an ordinarily routine voyage through well-charted waters."

Similarly, *In the New York Marine No. 10*, 109 F. 2d 564, 565 (2d Cir. 1940), the Court held that limitation could not be denied because of a deck hand's inexperience. According to the Court:

"[T]he deckhand's failure to stand by the hawsers when the tow was rounding a bend would seem to be a fault chargeable to the Master's failure to give instructions rather than to the dispatcher's knowledge of the employment of a green hand. Denial of limitation cannot be sustained on the ground of Costello's incompetence based only on his inexperience."

See also *Petition of Tracy*, 194 F.2d 362, 363 (2d Cir. 1952).

The basic rule concerning what constitutes privity and knowledge of the cause of the loss was set forth in *The 84-H*, 296 F. 427, 431 (2d Cir. 1923), cert. denied 264 U.S. 596, as follows:

"The privity or knowledge must be actual and not merely constructive. It involves a personal participation of the owner in some fault or act or negligence causing or contributing to the injury suffered. There must be some fault or negligence on his part or in which he in some way participates."

See also *Petition of Bloomfield Steamship Co.*, 422 F.2d 728 (2d Cir. 1970).

If Reimer and Kiernan failed to consult with one another about the voyage, that failure is similar to the failure of an otherwise competent officer to consult available

charts or other aids which the owners, in the exercise of due diligence, have put on board. In such cases, however, the courts have held that the error in management by the vessel's officers is not an unseaworthy condition for which the owner is responsible. In *California and Hawaiian Sugar Co. v. Columbia S.S. Co.*, 1973 A.M.C. 676, 685, 696 (E.D. La. 1972), for example, the Court held that a stranding was the result of errors in navigation and management on the part of the Master. Sailing directions for the area of the grounding were on board, but were not immediately available at the time of the accident. The Court held that the failure to have the sailing directions accessible at the time of the grounding constituted mismanagement by the Master, but was not an unseaworthy condition for which the owners were responsible.

Similarly, in *Savannah Sugar Refining Corp. v. Atlantic Towing Co.*, 15 F.2d 648, 651 (5th Cir. 1926), the Court held that a stranding was caused by the Master's failure to make proper use of information which was on board and available to him. See also *Complaint of Compania Naviera Epsilon, S.A.*, 1974 A.M.C. 2608 (S.D.N.Y. 1973), *aff'd per curiam on opinion below*, 506 F.2d 1395 (2d Cir. 1974), holding that "the error here lay not in the failure to supply available navigational information as a basis for intelligent navigational decisions, but in 'the failure of [the] Master to make proper use of the information which was available to him.'"; *The Oritani*, 40 F.2d 522, 527-28 (E.D. Pa. 1929), *aff'd per curiam* 54 F.2d 1075 (3d Cir. 1931), holding that the vessel was not unseaworthy because of the absence of a particular chart, where another chart on board contained practically all of the necessary information and this chart, along with the personal knowledge of the Master and the other officers, provided a sufficient means of navigating the area of the grounding; *United States v. Wessel, Duval & Co.*, 123 F. Supp. 318, 1954 A.M.C. 2070, 2102 (S.D.N.Y. 1954), holding that the Captain's failure to make proper use of notice to mariners on board the ves-

sel was an error in navigation or management; *The Temple Bar*, 45 F. Supp. 608 (D. Md. 1942), *aff'd* 137 F. 2d 293 (4th Cir. 1943); *The Aakre*, 122 F.2d 469 (2d Cir. 1941), *cert. denied* 314 U.S. 690 (1941); *In re Grace Line*, 1974 A.M.C. 1253 (S.D.N.Y. 1973); *Middleton & Co. (Canada) Limited v. Ocean D.S.S. Corp.*, 43 F. Supp. 29 (S.D.N.Y. 1941), *aff'd* 137 F.2d 619 (2d Cir. 1943), *cert. denied* 320 U.S. 802 (1944).

In determining whether a vessel is seaworthy, the test is quite simply "whether the vessel is reasonably fit" to perform the voyage. See *The Silvia*, 171 U.S. 462, 464 (1898). Thus, as the Court of Appeals for the Fifth Circuit recognized in *The African Neptune*, 530 F.2d 7, 12-13 (5th Cir. 1976), the correct standard is *not* whether better procedures *might* have reduced the possibility of casualty, but whether, under all the circumstances, the vessel was reasonably fit. In the present case, with Kiernan on board and available to assist and advise Reimer whenever necessary, regardless of any specific designation that he was "Captain" (which Kiernan's conduct shows must have been made), the Tug was reasonably fit to perform the voyage.

Spencer Kellogg & Sons, Inc. v. Hicks, 285 U.S. 502 (1932), is a leading case on the issue of what constitutes privity and knowledge in a limitation of liability action. There the Court denied a petition for limitation of liability with respect to multifold death and personal injury claims arising out of the sinking of the "Linseed King" in ice conditions on the Hudson River. The vessel was admittedly unseaworthy in ice conditions and the question considered by the Court was whether the operation of the vessel in ice conditions was within the privity and knowledge of her owners. The owners had issued general instructions that the vessel was not to operate if there was ice on the river, but failed to withdraw the vessel for the winter months, with the result that the Master undertook to operate her on the fateful day despite the presence of ice on the river. The

Court held that a managing agent who had responsibility for the vessel's operation could have ascertained the river conditions on the morning in question, and was negligent in failing "to assure himself by inquiries or by personal inspection" that the vessel would not operate. 285 U.S. at 510.

Spencer Kellogg may, of course, be distinguished from the present case. In that case, the vessel was admittedly unseaworthy and not fit to undertake the voyage. In the instant matter, however, there can be no doubt that the OCEAN PRINCE was in all respects fit for the voyage. Red Star had taken active steps to insure that there would be qualified navigators in the pilothouse, and that Kiernan would be available to assist Reimer whenever necessary.

Furthermore, in *Spencer Kellogg* the Court held that the causative fault rested with Stover, the works manager, who had responsibility for supervision of the vessel. According to the Court, "The decision as to when the ferry should be withdrawn for the winter rested with him." 285 U.S. at 510. It was the breach of duty by a person whose authority was such that it rendered his knowledge that of the company, which caused the casualty.

In the present case, however, if there was any causative fault for which Red Star is responsible, it was an error in navigation on the part of Reimer, which was outside their privity and knowledge. Furthermore, if an error in management of the Tug contributed to the grounding, it remains that this failure of the navigators on board to exercise their duty to consult one another if necessary about the voyage and the failure of Kiernan to give Reimer assistance, if it was necessary, was a fault outside the privity and knowledge of Red Star's corporate officers. It is well settled that where the party claiming the right of limitation is a corporation, "the privity or knowledge must be that of the managing officers of the corporation." *Craig v. Continental Ins. Co.*, 141 U.S. 638 (1891). Neither Kiernan nor Reimer was such an officer. See also *Richardson v.*

Harmon, 222 U.S. 96, 106, 56 L. Ed. 110, 114 (1911), holding that the owners may limit liability for any act of the Master and crew; *Petition of Tracy*, 194 F.2d 362 (2d Cir. 1952); *The George W. Pratt*, 76 F.2d 902 (2d Cir. 1935); *Petition of United States*, 69 F. Supp. 538, 542 (S.D.N.Y. 1947); *Jacobus Grauwiller Co., Inc. v. Reichert*, 136 F.2d 904 (2d Cir. 1943); *The Soerstad*, 257 F. 130, 131 (S.D.N.Y. 1919); *The George W. Fields*, 237 F. 403, 404 (S.D.N.Y. 1915).

Under the Limitation of Liability Act, the vessel owner may be denied the right of limitation only if the cause of the casualty was within his privity and knowledge. 46 U.S.C. § 183(a). The proof in this case shows that the grounding of the NEW LONDON was not the result of any cause within the privity and knowledge of Red Star, and that if Red Star is liable to Pittston, it is therefore entitled to limit the amount of that liability to the value of the Tug on February 3, 1974.

Even if it is assumed solely for purposes of discussion that Kiernan in fact understood that Reimer was the senior man—and Red Star denies vigorously that this was so—the evidence does *not* support a finding that this misunderstanding was in any way a cause of the grounding.

It is important to bear in mind that the burden of proving that the grounding was caused by negligence for which Red Star is responsible rests on Pittston. The question whether this cause was outside Red Star's privity and knowledge arises *only* if it is found that the grounding proximately resulted from this cause. See *The 84-H*, 296 F. 427 (2d Cir. 1923), *cert. denied* 264 U.S. 596 (1924); *In Re Farrell Lines, Inc. (The African Neptune)*, 530 F.2d 7, 1976 A.M.C. 1639, 1643 (5th Cir. 1976); *In Re Marine Sulphur Queen*, 312 F. Supp. 1081 (S.D.N.Y. 1970), *aff'd in part, rev'd in part*, 460 F.2d 89 (2d Cir. 1972), *cert. denied* 409 U.S. 982; *Application of Theisen*, 349 F. Supp. 737, 740 (E.D.N.Y. 1972); *In Re United*

States, 303 F. Supp. 1282 (E.D.N.C. 1969), *aff'd per curiam* 432 F.2d 1357 (4th Cir. 1970).

The evidence in this case shows beyond any doubt that, as he approached buoy 25, Reimer knew the obstruction lay ahead and that it was marked by the can buoy, and was actively searching for it well before the grounding occurred. Reimer believed he was in the center of the navigable channel, on a course that would take him east of the rock obstruction. Although there were snow flurries, visibility was good and Reimer was able to see both shorelines. He later realized that ice build-up north of Mystery Point created a false impression as to the location of the shoreline, but as he passed by there on the night in question he quite reasonably thought he was closer to the easterly bank than he was (Finding 34; 22a). Although he was mistaken in his judgment as to the Tug's actual position, he not unreasonably believed he knew where he was and did not consider it necessary to call for Kiernan's assistance.

There was no other available aid to navigation⁵ or local landmark which would have been of any use to Reimer, or any information or peculiarity of the area which Kiernan knew about and Reimer did not. The record, therefore, contains no evidence whatever to support the District Court's Finding No. 36 which states as follows:

"The grounding of the Barge NEW LONDON resulted, in part, from Reimer's lack of knowledge of local landmarks and experience in the Hudson River." (23a)

The only knowledge or information which would have been of any assistance to Reimer was already known to him and obvious on the chart which he was using.

⁵ The only other aid to navigation in the area was Con Hook Light No. 27 located on Con Hook Island, which is clearly indicated on the chart. The light did not come into view prior to the casualty, and in any event was intended as an aid for southbound vessels. It offers no assistance to northbound vessels (504a-505a).

Kiernan could have offered no assistance other than to alert Reimer to the presence of rocks at the "25" buoy, which Kiernan said he told Reimer during their fifteen minute discussion before Reimer went on watch, and which in any event Reimer was aware of as he approached the area. Finding 36, therefore, is clearly erroneous in that there existed no local landmark which would have aided Reimer that he was not aware of, and no causal connection established between the casualty and the fact that Reimer had not navigated the area before which is supported by anything but speculation, and neither Pittston nor the Government offered any evidence at trial, and present on their Briefs on this Appeal, which supports the Finding. The Finding should therefore be set aside.

Even if Finding 36 were allowed to stand, the record supports the conclusion of the District Court that the manning of the OCEAN PRINCE did not amount to an unseaworthy condition within Red Star's privity and knowledge. No doubt the District Court was impressed by Red Star's preparation for the trip in question. Red Star's dispatcher, Philip Keenan, specifically considered the combined experience of the two pilothouse men before assigning the OCEAN PRINCE to tow the NEW LONDON. He had on board two competent and experienced navigators having Captain's ratings, one of whom navigated the Hudson River for thirty years. It is rare indeed for both pilothouse men to have been to all areas a tug might visit, so it was not unusual that Reimer did not have Kiernan's work history on the Hudson. If there was any unfamiliarity on Reimer's part, it was a general unfamiliarity rather than lack of knowledge of specific conditions.

Even assuming that some lack of experience was causally related to the grounding—which Red Star strongly denies—the vessel is not unseaworthy merely because one of the Vessel's two navigators had not been to the area before if reasonable steps are taken to provide the navigator with

the navigation tools and information he might require to safely make the passage. *The Temple Bar, supra.* Red Star did just that when it assigned Kiernan to the Tug for this trip. To hold otherwise would be tantamount to holding that a vessel is unseaworthy per se if, in the case of tugboats which are, in effect, manned with two Masters, both men had not traversed previously every waterway to which the vessel travels. Pittston and the Government urge that standard in this case.

It is respectfully submitted that such a standard is unsupported by the authorities, and by sound industry standards. Consequently, the District Court properly held that Red Star took the appropriate precautions prior to dispatching the OCEAN PRINCE on the voyage in question. When the Tug passed Bear Mountain Bridge and buoy 25 did not come into view despite a diligent search for it, Reimer should either have stopped and/or called Kiernan if he was uncertain of the Vessel's position in respect of safe water, but if he was at fault for not doing either, the fault was his alone and not that of Red Star.

The Government's contention that Reimer was not a licensed Hudson River pilot, and that a licensed Hudson River pilot was not at the wheel, is irrelevant. As the Government well knows, pilotage is compulsory on the Hudson River *only* for foreign vessels and U.S. vessels under register. See *United States Coast Pilot 2, Atlantic Coast*, 235 (Exh. 3). The Tug OCEAN PRINCE is an uninspected towing vessel, however, and as the Government knows, is neither a foreign vessel nor a U.S. vessel under register and was *not* required to have a pilot on board.

Finally, in the last paragraph on page 16 of its Brief, Pittston seriously distorts an excerpt of testimony by Reimer, reproduced on page 172a of the Joint Appendix, and states that Reimer "demonstrated surprise" when, in referring to the chart during his deposition, he "learned that the symbol [at the location of the rock formation]

was for a lighted buoy", implying therefore that Reimer was confused on the night in question. The attempt to misuse that excerpt of the transcript is unfortunate.

It is clear from a reading of the testimony (172a) that there was confusion in the questioning which was corrected in the following two pages (173a-174a). Furthermore, the record is quite clear that Reimer, who was using the navigation chart which showed a symbol for a flashing green buoy, knew that the rock formation was marked on February 3, 1974 with a black can buoy which was a winter replacement for the lighted buoy, and was actively looking for it both visually with help of the Tug's powerful spotlight and with the radar.

B. The OCEAN PRINCE was equipped and supplied with all necessary nautical equipment and publications for a safe voyage

In its recitation of the facts, the Government states in its Brief that the OCEAN PRINCE was not equipped with a "pelorus or azimuth circle or any other equipment" with which to take bearings, and in its Summary of Argument, the Government goes on to say that the Tug had "virtually no navigational equipment . . . to ascertain the flotilla's position in the river, . . ." which, the Government concludes, is an element of willful negligence, implying, we presume, that Red Star knowingly omitted equipping the Tug with essential navigation aids, the absence of which rendered the Tug unseaworthy.

The Government cites no authority, nor offered any evidence at trial to support the proposition it implies here that the OCEAN PRINCE was not equipped with navigational aids it should have had.

The OCEAN PRINCE was equipped with, among other aids to navigation, direct pilothouse engine controls which enables the man on watch to control the engine speed and

direction from the pilothouse, a gyro compass, a magnetic compass, radar and a roof-mounted spotlight (11a-12a). At the relevant times, the Tug's radar, steering system and engine controls were operating properly (20a).

Furthermore, the Tug had on board for the voyage current issues of the United States Coast Pilot and Light List. Her chart for the area was a 1969 edition. A subsequent edition was available which showed that Buoy "21" had been renumbered to Buoy "25", but there were no relevant differences between the charts as to the location or characteristics of the relevant aids. There was no equipment or publication that the OCEAN PRINCE should have had that it did not have, and there was no offer of proof at trial that there was any deficiency in that regard. In addition, as the Government well knows, peloruses are not usual equipment on tugs because they have limited usefulness for the type of navigation tugboats are engaged in, and in any event, contrary to the statement contained in the Government's brief, a bearing can be and is taken with the radar.

The Government also states in its presentation of the facts that the 1969 edition of the chart which was aboard was not the latest addition, but its Brief is totally silent on how this factor was causally related to the casualty, a burden which rests on the Government and Pittston in their respective causes of action.

Even if the chart of the river on board the Tug was not the latest available, however, it did show the exact location of the buoy, which was not changed on the later chart. All the essential information needed to alert Reimer to the existence of the buoy was on board, and the Tug was not, therefore, unseaworthy because a later edition was not on board. See *The Nicolaos S. Embiricos*, 1974 A.M.C. 2608 (S.D.N.Y. 1973), *aff'd on opinion below*, 506 F.2d 1395 (2d Cir. 1974); *The Aakre*, 122 F.2d 469 (2d Cir. 1941), *cert. denied* 314 U.S. 690 (1941).

Moreover, the absence of the later chart could not have had any causal relation to the grounding. See, e.g. *American Smelting & Refining Co. v. S.S. Irish Spruce*, 548 F.2d 56 (2d Cir. 1977). Mate Reimer knew the location of the can buoy and was actively searching for it before the casualty. The grounding was not caused by any confusion on the Mate's part as to the existence or location of the buoy. See *Director General of India Supply Mission v. S.S. Maru*, 459 F.2d 1370 (2d Cir. 1972), cert. denied 409 U.S. 1115.

C. Failure to post a lookout was not causally related to the grounding

According to Reimer's testimony, he sent his deckhand below to get coffee prior to approaching the area of the "25" buoy, and the deckhand returned to the pilothouse at about the time of the grounding. During the time of the deckhand's absence, Reimer was alone in the pilothouse.

Reimer's testimony continued that during that time, he was actively searching for buoy "25" visually and with radar but never found it because it was under the ice floe which accumulated south of Con Hook Island. The buoy was first sighted after the casualty, abeam the Tug after the entire length of the Barge passed over the area. The buoy at that time was laying over on its side under ice and partially visible near the Vessels' wake, from which Reimer concluded the Vessels freed the buoy from the ice jam when they passed over the area.

The District Court accepted that testimony and found the buoy was obscured by the ice. The following findings by the Court are relevant on this subject:

32. "As the Tug and her Tow passed abeam Mystery Point, Reimer did not locate the '25' can buoy either visually or on the radar. . . . Reimer reduced engine speed turned on the Tug's powerful spotlight to illuminate the area ahead, and con-

tinued to search for the buoy visually and by radar."

33. * * *

"After impact, Reimer sighted the buoy to the starboard partially visible in the ice near the Vessel's wake. He assumed that the Barge and the Tug in making the turn to starboard after the incident had freed the buoy from the ice."

34. "The buoy was obscured by ice and was not seen by Reimer as the Tug and Tow approached it. * * *

48. "The obscuring of the buoy by ice contributed to the grounding in that if the buoy had been visible it would have indicated to Reimer he was off course and to the west of the channel." (21a, 22a, 25a)

Clearly the District Court was satisfied that buoy "25" was not visible prior to the grounding, and it therefore refused to hold that the absence of a lookout was causally related to the grounding. The District Court had this to say in its Opinion (at page 30):

"The buoy, according to the evidence, was not visible until freed from the ice by the wake of the passing Tug. Indeed, as indicated earlier, had the deckhand been in the wheelhouse, he would have been more useful taking the wheel and freeing Reimer to either take navigational fixes or call Kiernan, the experienced pilot. Therefore, the failure to post a lookout cannot be said to have contributed to the collision." (40a)

Red Star's burden on this point has therefore been met, *Dwyer Oil Transport Co. v. The Edna M. Matton*, 255 F.2d 380 (2d Cir. 1958), and the question of privity in respect of the lookout, therefore, does not arise.

Nor is the District Court's conclusion inconsistent with its Finding 38 (23a) in which it states that "Reimer failed

to post a lookout when conditions were such that same was required." While it might have been prudent to post a lookout, buoy "25" was not to be seen and the failure to employ a lookout was therefore not causally related to the striking of the rock formation which it marks.

The Government also argues that a lookout might have seen Con Hook Light Tower No. 27 located on an island one-third ($\frac{1}{3}$) mile away from the rock formation, which Reimer did not see prior to the casualty. However, the Con Hook Light was not intended to assist northbound vessels in avoiding the rock, and in fact is of no use at all to a northbound vessel (24a, 504a-505a).

The District Court's conclusion that there was no causal connection between the absence of a lookout and the casualty is fully supported by the record and should not be disturbed on this Appeal.

Even if the District Court found that the absence of a lookout was causally related to the grounding, any error attributable to Reimer in that regard is clearly not within Red Star's privity and knowledge. There is no evidence whatever that Red Star condoned a practice on board its tugs of not employing lookouts if conditions were such that a lookout was required, or, indeed, that there was such a practice.

In the District Court, the Government read deposition testimony by Mr. Walter Kristiansen, Vice President of Operations for Red Star, as support for the contention that such a practice was condoned. The record shows, however, that Mr. Kristiansen *never* stated that Red Star approved of lookouts going below for coffee. Rather, he stated that it was not out of the ordinary *for a deckhand not assigned to act as a lookout* to go for coffee if ordered to do so by the Tug Captain. The deposition testimony read as follows:

"Q. The deckhand who is on watch together with either the mate or the captain, including their respec-

tive watches, what duties do they perform when the boat is underway?

A. Duties assigned by the captain for seeing that the towed vessel is still properly made up, that the lines are correct, lookout duties, if required, and occasionally taking the helm.

Q. Is it quite usual that they go down and get coffee?

A. Very usual—

Q. How long have you known that?

A. —because I was a deckhand.

Q. So it wouldn't surprise you at all if the deckhand on Mr. Reimer's watch shortly before the accident had gone to get coffee?

A. Not at all.

Q. It is fairly standard practice?

A. Yes."

(Kristiansen Deposition, pp. 57-58). (Exh. CC)

The trial testimony continued, however:

"The Court: So when you said it was not uncommon for a deckhand to go down for coffee, you were speaking of the deckhand on duty?

The Witness: Yes, sir.

The Court: Does that mean that you do not view the deckhand's primary function while underway as being a lookout?

The Witness: It depends upon the circumstances.

The Court: Take 2:00 a.m. in the morning on a snowy night when there are no aids to navigation in sight.

The Witness: His primary duty should be a lookout and I would expect him to be a lookout.

The Court: Is it in conformance with your policy under weather conditions of that sort for the deckman who is serving as a lookout to go below for coffee at such a time?

The Witness: Absolutely not.

The Court: But on a less troublesome occasion, say broad daylight, offshore, nothing nearby, when a lookout doesn't appear to be of such great necessity, then you would not think it unusual for him to go for coffee?

The Witness: Not at all." (320a-321a)

At another point in the questioning, Kristiansen had this to say concerning the policy on lookouts:

"Q. Does Red Star have any policy concerning the use of lookouts?

A. Yes.

Q. Can you describe that policy?

A. We expect that lookouts be posted and maintained in accordance with the rules of the road, period." (316a)

POINT II

Red Star is Entitled to Limit its Liability to the Government to \$19,800.

The Government concedes that its rights in respect of its pollution clean-up expenses arise under the Pollution Statute, 33 U.S.C. § 1251 et seq. Since the District Court held that the discharge of oil from the Barge NEW LONDON resulted from an error in navigation and management on the part of Mate Reimer not contributed to by an act or omission on the part of Pittston, as owner of the discharging vessel, the rights of the Government in this case in respect of its pollution clean-up expenses are set forth in the third party liability provisions of the Pollution Statute, 33 U.S.C. § 1321(g) which states as follows:

"Third party liability 1321(g). In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection

(b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, *such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government*, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. *If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed \$100 per gross ton of such vessel or \$14,000,000, whichever is the lesser.* In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs." (Emphasis added).

The questions raised by the Government on this appeal concern the application of the quoted section of the Pollution Statute insofar as the limitations therein contained are concerned.

Under the Pollution Statute, Red Star's third-party liability for the Government's clean-up expenses is limited to \$100 per ton of the Tug "OCEAN PRINCE", unless the Government can affirmatively establish that the casualty was caused by "willful misconduct or willful negligence within Red Star's privity and knowledge," in which case the Government may recover the full amount of its removal costs. If, as Red Star submits is the case, the grounding was not caused by "willful misconduct or willful negligence within their privity and knowledge", Red Star's liability for the Government's clean-up costs should be limited to \$19,800, based on the tonnage of the Tug, as the District Court held.

A. The grounding and resulting pollution did not result from willful negligence or willful misconduct within Red Star's privity and knowledge.

Red Star is not aware of any case in which a court has interpreted the provision in the Pollution Statute for "willful misconduct or willful negligence within the privity and knowledge" of such third party. The Government's contention as to the application of that provision herein, however, is manifestly at odds with settled principles of law and the facts of this case.

Since the District Court held the Tug was not unseaworthy, and further that the cause of the grounding was not a fault within the privity and knowledge of Red Star, it never reached the question of what constitutes willful negligence or misconduct.

Although the words "willful negligence" present a contradiction in terms, Red Star submits that Congress must

have intended to refer to *knowing and intentional acts which go beyond gross negligence*. The phrase is defined in *Black's Law Dictionary* 1186 as follows:

"Willful Negligence. Though rejected by some courts and writers as involving a contradiction of terms, this phrase is occasionally used to describe a higher or more aggravated form of negligence than 'gross.' It then means a willful determination not to perform a known duty, or a reckless disregard of the safety or the rights of others, as manifested by the conscious and intentional omission of the care proper under the circumstances. *Victor Coal Co. v. Muir*, 20 Colo. 320, 38 P. 378, 26 L.R.A. 435; *Holwerson v. Railway Co.*, 157 Mo. 216, 57 S.W. 770, 50 L.R.A. 850."

"Willful misconduct" clearly refers to an intentional act designed to cause harm. In *Grey v. American Airlines*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied* 350 U.S. 989 (1956), the Court defined willful misconduct in the context of claims under the Warsaw Convention for deaths caused by an airplane crash as follows:

"There is no dispute as to what constitutes willful misconduct. The instructions required proof of a 'conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty.' There must be a realization of the probability of 'injury from the conduct, and a disregard of the probable consequences of such conduct'."

Red Star submits, therefore, that to establish a valid claim against it for the entire amount of its pollution clean-up expenses, the Government must show that the grounding was the result of an intentional, knowing act or omission by Red Star in reckless disregard of the possibility its conduct would cause an oil spill. The record in this case does not support this claim, and Red Star's

liability to the Government must be limited in accordance with the \$100/ton provision of the Pollution Statute as the District Court held.

It is also to be noted that the provision for recovering the entire amount of clean-up costs where there is "willful negligence or willful misconduct within the privity or knowledge of such third party" does not establish the same requirement of proof as does the provision in the Limitation of Liability Act, 46 U.S.C. § 183(a). In the latter Act, limitation may be broken if the vessel owner fails to prove that the cause of the loss was outside his privity or knowledge, without regard to whether the cause was negligence equivalent to "willful negligence or willful misconduct". Moreover, whereas under the Limitation of Liability Act the burden of proof is on the vessel owner to show the absence of privity, under the Pollution Statute, the burden is on the Government to establish willful negligence within the third-party's privity and knowledge. 33 U.S.C. 1321(g).

In addition, although the meaning of certain sections of the Pollution Statute is less than explicit, the language of section 1321(g) clearly indicates the intent of Congress that the Government recover the full amount of its clean-up expenditures from a third-party only if they were necessitated by willful negligence or willful misconduct within the privity and knowledge of that third-party. Thus, to sustain its claim against Red Star, the Government must show that there was willful negligence or willful misconduct within the privity and knowledge of Red Star. Contrary to the Government's contention in the District Court, the privity and knowledge of the Tug's navigators is entirely irrelevant in this regard.

Each and every one of the Government's contentions that the Tug was unseaworthy is entirely refuted by the evidence. The Government, like Pittston, contends that Mate Reimer was incompetent. Mate Reimer, however, was

licensed by the Coast Guard to operate the Tug on the Hudson River, and was fully qualified by the Government's own standards to navigate the Tug on the night in question. Moreover, he had many years of experience as a navigator and had proven himself to be a qualified, able tug captain who knew very well how to use radar and all other equipment and navigational aids on board the Tug. Although the Government contends he had no "real" training at a navigation school or in the use of radar, such training has *never* been the test of competence. If Mate Reimer made an error in navigation, this was not in any event the result of "willful negligence or willful misconduct" within the privity and knowledge of Red Star. On the basis of the Mate's experience and qualifications, Red Star was fully justified in placing him in command of the Tug on the night in question.

All the Government's other contentions that the Tug was unseaworthy are dealt with at length in Point I of this Brief, and for the sake of brevity will not be repeated here. Suffice it to say that the evidence in no way provided any basis for a finding the Tug was unseaworthy in any respect, and the District Court so held. Even if it is assumed solely for the purposes of argument, however, that the Tug was unseaworthy, this fact would not entitle the Government to recover its entire clean-up costs. Contrary to the Government's argument, unseaworthiness is not in and of itself "willful negligence or willful misconduct within the privity and knowledge of the third-party." Rather, the intent of the Congress as expressed in the Pollution Statute is clear that to recover the entire amount of its clean-up costs, the Government must show that an unseaworthy condition was intentionally caused by Red Star in reckless disregard of the possibility its conduct would cause an oil spill. Thus, while the District Court did not hold the Tug was unseaworthy in any respect, even if the District Court had found otherwise, Red Star is entitled under the Pollution

Statute to limit its liability to \$100 per ton of the Tug's gross tonnage unless the Government proved that the Tug was unseaworthy as the result of "willful negligence or willful misconduct within the privity and knowledge of Red Star."

B. The Flotilla Rule has no application to this case, and Red Star's liability for pollution clean-up expenses should be based only on the tonnage of the Tug OCEAN PRINCE

The Government's alternative contention that even if Red Star is not liable for the full amount of its clean-up costs, the tonnage to be used in determining the amount of Red Star's liability should include both the Tug and Barge, is contrary to the plain language of the Pollution Statute, 33 U.S.C. § 1321(g). Although Plaintiffs have located no case involving the Pollution Statute in which the novel "flotilla" theory propounded by the Government in this action has heretofore been tested, the language of the Pollution Statute is unambiguous, and clearly shows that there is no basis for this contention.

Section 1321(g) comes into operation only if the discharging vessel, here the Barge New LONDON, can show that the oil spill was caused solely by the negligent act of a third party. Under Section 1321(f), if the barge owner can prove that the discharge was caused by the act of a third party, he is excused from liability for the Government's clean-up expenses, and the Government must then look to that third party under Section 1321(g). Thus, in this case, Red Star's liability to the Government must be predicated on a finding that Pittston, as Owner of the Barge, is not itself liable to the Government.

Having found that the Barge owner is not liable to the Government, and that Red Star as operator of the Tug bears third-party liability for the clean-up expenses, it would be entirely contrary to the intent and plain language

of the Pollution Statute to then combine the tonnage of the Barge with that of the Tug to compute the amount of Red Star's liability. The Pollution Statute, 33 U.S.C. § 1321(g), provides *inter alia*, as follows:

"If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed \$100 per gross ton of such vessel or \$14,500,000, whichever is lesser." (Emphasis supplied)

The legislative history of the Pollution Statute shows beyond any question that Congress intended that only the tonnage of the vessel which caused the discharge be considered in determining the amount of the third party's liability to the Government. *Conference Rep. No. 91-940*, 91st Cong., 2d Sess. (Mar. 24, 1970), in 2 *U.S. Code Congress & Admin. News* 2725, states as follows with respect to the third-party liability provision of the Water Quality Improvement Act of 1970,* the predecessor of the Pollution Statute:

"If the third party is the owner or operator of a vessel which caused the discharge, then that third party's liability is limited to \$100 per gross ton of such vessel or \$14,000,000, whichever is lesser."

The third-party liability provision of the 1970 Act remained essentially intact when the Pollution Statute was adopted in 1972, and there is no evidence of any Congressional intent with respect to either Act to permit the Government to recover an amount based on the combined

* Act of April 3, 1970, Pub. L. No. 91-224, 84 Stat. 91 (codified at 33 U.S.C. § 1161 *et seq.*), as amended, Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (Supp. II, 1977).

tonnage of the Tug and Barge where the Barge was a completely passive instrument in the casualty.

The Government's "flotilla" concept is essentially an attempt to borrow an idea from case law which has developed under the Limitation of Liability Act, 46 U.S.C. § 183 *et seq.* Even if Congress had intended that the principle be applicable in claims by the Government under the Pollution Statute for clean-up expenses, and there is no evidence that this is so, the "flotilla theory" would have no application in this case. In limitation of liability cases, the "flotilla rule" is applicable only if two requirements are fulfilled: first, the tug and barge must be commonly owned, and second, the claim against the owner must be contractual in nature. See *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal*, 251 U.S. 48 (1919); *Deep Sea Tankers v. Long Branch*, 258 F.2d 757, 773 (2d Cir. 1958), *cert. denied* 358 U.S. 933; *In Re Midland Enterprises*, 296 F. Supp. 1356, 1360-61 (S.D. Ohio 1968); *South Carolina Highway Dep't v. Jacksonville Shipyards, Inc.*, 1976 A.M.C. 456, 469-73 (S.D. Ga. 1975); 3 *Benedict on Admiralty* § 54.

Neither of these requirements can be met in this case. The Tug and Barge were not commonly owned (if they were, the third-party liability provision of the Pollution Statute would not be applicable). Moreover, an oil spill in navigable waters is a maritime tort. See *Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *State of California v. The Bournemouth*, 307 F. Supp. 922 (C.D. Cal. 1969); *Petition of New Jersey Barging Corp.*, 144 F. Supp. 340 (S.D.N.Y. 1956). In a pure tort situation, the flotilla rule has no application. See *Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn Eastern District Terminal*, *supra*.

Therefore, the District Court properly excluded the gross tonnage of the Barge in computing Red Star's liability.

Conclusion

The District Court correctly held that the grounding of the *NEW LONDON* was caused by errors in the navigation and management of the Tug on the part of Mate Reimer, and that no element of unseaworthiness or fault within the privity and knowledge of Red Star caused or contributed thereto; accordingly, Red Star was properly entitled to limit liability in respect of Pittston's damages to the value of the Tug *OCEAN PRINCE* and her pending freight immediately following the voyage in accordance with the Limitation of Liability Act, 46 U.S.C. § 183, and properly entitled to limit its liability to the Government to \$19,800 in accordance with the provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1321(g). The judgment of the District Court granting limitation of liability to Pittston and the Government as to their respective claims should be affirmed, but the judgment should be reversed to the extent that it dismissed Red Star's claim against the Government for contribution in respect of Pittston's damages. Red Star should be awarded costs against all other parties to the appeal.

Respectfully submitted,

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